IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.846 OF 2006

Shri Mansukhlal Hargovindas Jasani ...Appellant
vs.
Shri Kathod Giga Pathare ...Respondents
.....Respondents.

Sachin Dhakephalkar for the applicants.

A.R. Pitale for respondent no.1.

CORAM: S.B. DESHMUKH, J.

October 11, 2006.

P.C. :

1. Heard the learned counsel for the parties.

2. The defendant in R.C.S.No.1012 of 2003 is the appellant in this Second Appeal filed in the High Court challenging the judgment and decree passed by the First Appellate Court in Civil Appeal No.15 of 2006. Parties hereinafter referred to their status as plaintiff and defendant in R.C.S.No.1012 of 2003.

3. The plaintiff, filed R.C.S.No.1012 of 2003 for possession of the suit property. The suit seems to have been filed on November 7, 2003. The defendant after service entered appearance filed written statement at Exhibit 14. The trial court, considering the pleadings of the parties framed as many as three issues. Considering the evidence laid on behalf of the parties, the trial court decreed the suit by the judgment and decree passed on December 22, 2005.

4. The defendant, being aggrieved and dissatisfied with the judgment and decree passed by the trial court in R.C.S.No.1012 of 2003, filed Civil Appeal No. 15 of 2006 in the court of the Learned District Judge at Pune. Civil Appeal No. 15 of 2006 after hearing the parties, is dismissed by the Learned Additional District Judge, Thane on July 31, 2006.

5. It is this judgment and decree as noted above is challenged by filing the Second Appeal in this

court under Section 100 of the Code of Civil Procedure.

6. The learned counsel for the applicant, submits, that notice of eviction served on the defendant is not in accordance with the provision laid down under Section 106 of the Transfer of Properties Act. According to him the defendant was inducted by lease deed for the period of 11 months commencing from July 1, 2002 till 31.5.2003. However, plaintiff has accepted rent for the month of June, 2003. According to him, plaintiff therefore has waived a right of eviction and defendant is the "holding over tenant". In the absence of legal notice, suit filed by the plaintiff is not maintainable and courts below ought to have dismissed the suit. He also submits that R.C.S. No. 728 of 2003 is filed by him seeking specific performance of the agreement. Copy of the lease agreement is on record. According to him both the suits i.e. suit for specific performance filed by the defendant being R.C.SNo.728 of 2003 and R.C.S.No. 1012 of 2003

filed by the plaintiff for eviction and possession of the property ought to have been considered and disposed of simulatenously. He also invited my attention to the order passed by the Learned District Judge under Section 24 in Civil Miscellaneous Application No. 32 of 2005.

7. The learned counsel for the respondent, has referred to the findings recorded by the trial court as well as the first appellate court. According to him the finding on question of fact regarding the nature of tenancy is decided by the trial court and confirmed by the First Appellate Court. He submits that no substantial question of law within the parameters of Section 100 of the Code of Civil Procedure is involved. He therefore seeks dismissal of the appeal.

8. The learned counsel for the appellant has made available a compilation of pleadings, evidence and exhibited documents filed in the suit in question. The said compilation is marked by letter ‘X’ for identification and taken on record. I have perused

the lease dated 23.5.2002. This lease is in between the plaintiff and wife of defendant namely Smt. Indumati Mansukhlal Jasani. The lease period is given in clause 2 of the documents commencing from July 1, 2002 till May 31, 2003. It is specifically mentioned that this lease is only for 11 months. Regarding renewal, Clause 11 is material. The option of renewal with the parties, is noted in this clause. Another lease dated July 29, 2002 is also perused by me. This lease deed is between the plaintiff and the defendant. In this lease deed, also the same period is mentioned in Clause 2. Clause 12 of this lease deed, specifically provides that renewal of the lease will be the option available to the parties. The courts below have justifiably referred to the documents and recorded a finding that lease, in relation to suit property, was for a fixed period i.e. commencing from July 1, 2002 till May 31, 2003. In other words the lease period was fixed by the parties themselves. In these circumstances, the courts below have considered the provision laid down under Section 106 of the Transfer of

Properties Act. It came to an end by a afflux of time.

9. I have perused the finding recorded by the trial court as well as the first appellate court. The First Appellate court has justifiably referred to the judgment of the apex court in the matter of Bhaganbandas Agarwala vs. Bhagwandas Kanu and Ors reported in AIR 1977 S.C. 1120 regarding construction of notice under Section 106.

10. I have also considered the submissions advanced on behalf of the defendant regarding alleged waiver and acceptance of rent by the plaintiff for the period of June, 2003 i.e. after the period of 11 months. The learned counsel for the defendant could not point out such pleadings in the Written Statement. In the absence of such pleadings i.e. foundation even if evidence is laid on behalf of the defendant is of no use being in variance of pleadings. Apart from this it is not established on record that said rent is being accepted by the plaintiff for the month of June,

2003. In the notice issued by the plaintiff to the defendant, it is specifically alleged that an amount of Rs.3000/- for the period of 11 months was recovered on account of adjustment at the rate of Rs.300/- per month and rent for the month of May 2003, to the extent of Rs.600/- was considered by the plaintiff. With this calculation, the plaintiff has offered the remaining amount of Rs.11,400/- from the security deposit of Rs.15,000/- to the defendant. Therefore, the submission on behalf of the appellant regarding waiver and or alleged status of the defendant as 'tenant holding over' cannot be accepted.

11. On examination of pleadings, evidence and judgment of the courts below I find no substantial question of law is involved in this Second Appeal. Second Appeal needs to be dismissed at this stage.

12. At this stage, the learned counsel for the appellant submits that appellant / defendant is residing in the suit property alongwith family

members and is also carrying out business in the suit property. He seeks 6 months time for vacating the suit property.

13. The learned counsel for the plaintiff refers to the agreement which was only for the period of 11 months. The trial court has passed a decree for damages at the rate of Rs.600/- per month from 1.6.2003. This judgment shall stand suspended till 31.1.2007 on condition :

(i) that the defendant / appellant shall deposit the damages of the suit property as awarded by the trial court at the rate of Rs.600/- per month from 1.6.2003 till October, 2006 on/or before 15.11.2006.

(ii) that the defendant / appellant shall file undertaking in this court on or before 15.11.2006, that, he would not part with the possession of the suit property and or create third party interest in relation to the suit property.

14. With these conditions, this judgment shall stand suspended till 31.1.2007. Second Appeal is thus dismissed with time of vacation till 31.1.2007 subject to conditions as noted aforesaid.

15. This judgment is delivered, in the suit filed by the plaintiffs, seeking possession of the property. The court seized with the hearing of R.C.S.No. 728 of 2003 shall decide the suit in accordance with the provisions of law.

(JUDGE)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 1348 OF 2006

IN

SECOND APPEAL NO. 846 OF 2006

Shri Mansukhlal Hargovindas Jasani .... Appellant
vs.
Shri Kathod Giga Pathare ....Respondent

Sachin Dhakephalkar for the applicants.
A.R. Pitale for respondent no.1.

CORAM: S.B. DESHMUKH, J.

October 11, 2006.

P.C. :

1. This Civil Application does not survive in view of the dismissal of the appeal. Interim relief, if any, stands vacated. This application is accordingly dismissed and disposed off.

(JUDGE)